No. 83611-6

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

WHATCOM COUNTY FIRE DISTRICT NO. 21,

Petitioner,

v.

WHATCOM COUNTY, a municipal corporation; BIRCH POINT VILLAGE, L.L.C., a Washington corporation; SCHMIDT CONSTRUCTING, INC., A Washington corporation; and BRIGHT HAVEN BUILDERS, LLC, a Washington corporation; MAYFLOWER EQUITIES, INC.; LISA SCHENK and MIKE SUMNER,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT DEVELOPERS

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INTRODUCTION

This appeal will decide whether a county or a fire district has final authority to determine concurrency under the Growth Management Act.

> The concept of concurrency is based on the maintenance of specified levels of service with respect to each of the public facilities to which concurrency applies. For all such facilities, *counties and cities* should designate appropriate levels of service.

WAC 365-196-840 (emphasis added)(Appendix A). Petitioner Fire District 21 argues it has the final say. "*Nothing* in [the Growth Management Act] allows a county to set service levels over a fire district and its separately elected board." (Petition for Review at 11). The Whatcom County Hearing Examiner disagreed, ruling that Whatcom County makes the final decision.

> The Birch Bay Comprehensive Plan indicates that adequate fire service facilities will be funded by the fire district's taxing authority. This Comprehensive Plan statement is determinative of the availability and adequacy of funding for fire protection services inside the boundaries of Fire District No. [21].

(Hearing Examiner's Decision at 11; CP 348)(Appendix B).

Respondents Birch Point Village LLC, Schmidt Constructing, Mayflower Equities, and Lisa Schenk and Mike Sumner (Birch Point Village) are four developers caught in the middle. They

independently sought approvals for developments in Birch Bay, a resort community north of Bellingham. (Project Summary; CP 336-37). In the summer and fall of 2006, the Whatcom County Council approved each project, unpersuaded by Fire District 21's allegation that it lacked adequate capacity to serve them.

The District filed this LUPA appeal and has fought the County's approval throughout. At issue is which entity -- the District or the County -- makes the final decision on whether concurrency exists for these four projects. Because the Growth Management Act gives the County that authority, and the County exercised it lawfully, Birch Point Village respectfully requests this Court to affirm the decision of the Whatcom County Hearing Examiner and dismiss this appeal.

I. STANDARD OF REVIEW AND BURDEN OF PROOF

In a LUPA appeal, this Court reviews the Hearing Examiner's decision directly, rather than the rulings from the Superior Court and Court of Appeals.

> This court stands in the same position as the superior court. Review is limited to the record before the [County] Council.

Isla Verde Intern. Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 751, 49 P.3d 867 (2002) (citations omitted). Furthermore, as the

party seeking relief from the County's decision, the District has the burden of proving one of six grounds for reversal under RCW 36.70C.130(1). Isla Verde, 146 Wn.2d at 751. ("the court may grant relief only if...the party seeking relief from the land use decision has carried the burden of establishing that one of these standards has been met").

The District's petition for review does not identify which statutory ground it seeks to prove. In its Superior Court briefing, however, the District asserted four challenges under RCW 36.70C.130(1):

> a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts.
>
> RCW 36.70C.130(1).

(Petition's Brief on the Merits at 3; CP 303) (LUPA Petition at 20; CP 629).

This Court reviews the Hearing Examiner's findings of fact for substantial evidence in the record and conclusions of law *de novo*.

> Statutory construction is a question of law reviewed de novo under the error of law standard. In order to conclude that substantial evidence supports the factual findings, there must be a sufficient quantity of evidence in the record to persuade a reasonable person that the declared premise is true.

Isla Verde, 146 Wn.2d at 751-752 (citations omitted). In addition, this Court gives deference to Whatcom County's interpretation of its comprehensive plan and ordinances. Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004) ("review of any claimed error of law in the City Council's interpretation of city ordinances is de novo and must accord deference to the City Council's expertise").

II. WHATCOM COUNTY HAS FINAL AUTHORITY TO DECIDE CONCURRENCY

The crux of the Hearing Examiner's decision is that

> since the Whatcom County Council has the authority to determine concurrency under the Growth Management Act and since the Whatcom County Council has determined within the Birch Bay Comprehensive Plan that Fire District No. [21] has

> adequate current capacity and that arrangements for adequate funding are in place to provide for future growth, Fire District No. [21] cannot stop this development by refusing to issue a concurrency letter.

(Hearing Examiner's Decision at 12; CP 349). This in turn rests on a legal issue: who decides whether concurrency exists and what criteria do they use? Department of Commerce regulations answer these questions decisively. The County decides in its Comprehensive Plan.

A. The Three Elements For Judging Concurrency – Availability, Adequacy, and Levels of Service

The Growth Management Act identifies concurrency as one of thirteen planning goals "to guide the development and adoption of comprehensive plans and development regulations." RCW 36.70A.020. For its public facilities and services, Whatcom County should

> [e]nsure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

RCW 36.70A.020(12). This includes fire protection services. RCW 36.70A.030(13).

Recently amended regulations from the Department of Commerce define both the purpose of concurrency and how to know when it exists. The purpose of concurrency is to assure that public facilities and services will support new development. WAC 365-196-840(1)(a). Concurrency exists when public facilities and services are adequate for new development.

> Concurrency describes the situation in which adequate facilities are available when the impacts of development occur, or within a specified time thereafter. Concurrency ensures consistency in land use approval and the development of adequate public facilities as plans are implemented, and it prevents development that is inconsistent with the public facilities necessary to support the development.

WAC 365-196-840(1)(b).

Three interrelated concepts – availability, adequacy and levels of service – determine whether concurrency exists for a planning area. First, public facilities and services must be available. For instance, Birch Bay must have fire protection for new developments. This typically involves a developer obtaining "will serve" letters from providers of water, sewer, fire protection and so on, showing that they have these necessary services.

Second, the providers must have adequate capacity to serve new developments.

> Concurrency means that adequate public facilities are available when the impacts of development occur, or within a specified time thereafter.

WAC 365-196-210(7). Adequate capacity need not exist on the day the County approves the development. Instead, plans must be in place to create the capacity within a specified time.

Third, the County determines adequacy based on an established level of service.

> Adequate public facilities means facilities which have the capacity to serve development without decreasing levels of service below locally established minimums.

WAC 365-196-210(3). The level of service sets the minimum standard.

> Level of service means an established minimum capacity of public facilities or services that must be provided per unit of demand or other appropriate measure of need. Level of service standards are synonymous with locally established minimum standards.

WAC 365-196-210(19).

In light of these three concepts, concurrency exists when facilities and services are adequate during development or within a specified time afterwards. Conversely, concurrency does not exist if facilities are not available or if they will be permanently below adequate capacity, namely development pushes facilities or

services under the level of service for more than a set time. WAC 365-196-840(1)(a) ("adequate to serve that development at the time it is available for occupancy and use, without decreasing service levels below locally established minimum standards").

B. Whatcom County Sets The Level Of Service For Concurrency Review

The controversy in this case involves the level of service. No dispute exists that fire protection service is available in the Birch Bay urban growth area. The question is whether adequate capacity will exist when the area is developed. Until November 24, 2009*, the Birch Bay Community Plan found concurrency for fire protection services under the following level of service.

> The gold standard for successful emergency medical services is four to six minute response times for aid services and 15 to 20 minutes for ambulance services...Response for fire emergencies is also time dependent and require larger numbers of personnel and fire suppression equipment. Fire District # 13 [now # 21] responds between five and six minutes. To shorten the response time the fire District has career and volunteer firefighters and emergency medical technicians manning the fire station in Birch Bay 24 hours a day.

* On November 24, 2009, the Whatcom County Council amended the Community Plan by adopting the Fire District's Capital Facilities Plan. Respondents will file a motion to dismiss review as moot, which details the consequence of these amendments.

(Birch Bay Community Plan at 15-6; CP 244). The Fire District seeks review of this question:

> Under the Growth Management Act, RCW 36.70A ("GMA"), does a county in its comprehensive plan have the authority to set levels of fire and emergency services to be provided by a fire district?

(Petition for Review at 1-2).

The Department of Commerce's recent amendments make clear that *for purposes of concurrency under the Act*, the County sets the level of service.

> (3) Establishing an appropriate level of service.
>
> (a) The concept of concurrency is based on the maintenance of specified levels of service with respect to each of the public facilities to which concurrency applies. For all such facilities, *counties and cities should designate appropriate levels of service.*
>
> (b) Level of service is typically set in the capital facilities element or the transportation element of the comprehensive plan. The level of service is used as a basis for developing the transportation and capital facilities plans.
>
> (c) Counties and cities should set level of service to reflect realistic expectations consistent with the achievement of growth aims. Setting levels of service too high could, under some regulatory strategies, result in no growth. As a deliberate policy, this would be contrary to the act.

WAC 365-196-840 (emphasis added).

As detailed in Birch Bay Village's briefing in the Court of Appeals, Fire District 21 has claimed a lack of concurrency based on its own levels of service – National Fire Protection Association (NFPA) standards 1710 (four minute response) and 1720 (eight minute response). (Opening Brief at 15) (Reply Brief at 2-6, 12-13). Until amending its comprehensive plan on November 24, 2009, the County did not endorse or adopt these national standards. During concurrency review of the four projects, the District changed the standards for response times from the County's.

The Court of Appeals ruled correctly that the District cannot negate the County's fundamental land use choices in its Comprehensive Plan.

> Because the Whatcom County Comprehensive Plan establishes the standards for service and finds that the fire district has the capacity to meet that standard, the fire district is foreclosed from evaluating concurrency with new development on a project-by-project basis and requiring a concurrency mitigation fee.

Whatcom County Fire Dist. No. 21 v. Whatcom County, 151 Wn. App. 601, 605, 215 P.3d 956 (2009).

The District may argue that the County has no authority over its provision of fire protection services. The District is right. The District is responsible for its operations. But concurrency is a

question of land use planning and governance, not operations. No one argues that the County should tell the District how to provide fire and emergency services. But the converse is also true – Fire Districts do not hold trump cards over the County's Comprehensive Plan and development regulations. If the Fire District believes the level of service is too high in the Birch Bay Plan, it must use the County's procedures to amend the Comprehensive Plan. The District does not have power to change it unilaterally.

III. NEITHER THE COUNTY NOR THE DISTRICT CAN CHANGE THE STANDARDS DURING PROJECT REVIEW

A. The Community Plan Set The Concurrency Standards

Once the County adopted its concurrency standards in the Birch Bay Community Plan, neither it nor the District could change those standards without amending the Plan. As the Hearing Examiner ruled,

> [i]f Fire District [21] believes that the current Comprehensive Plan is inadequate to meet its funding needs in order to allow it to provide adequate services for future growth, the Fire District can docket the issue on the County's yearly Growth Management Act review calendar and have the issue re-visited. The issue cannot be revisited at a specific project approval phase, as the Fire District is attempting to do here. Until, and unless, the Comprehensive Plan for Birch Bay is amended to remove the statement that the fire district will be able to provide adequate services based on its current taxing abilities, Fire District No.

> [21] cannot assert a lack of ability to do so on a project by project basis.

(Hearing Examiner's Decision at 11; CP 348). Under RCW 36.70B.030, the Hearing Examiner is right.

The Birch Bay Community Plan set two concurrency standards for fire service in its urban growth area. First, as quoted above, the level of service is the gold standard – four to six minute emergency response times. (Birch Bay Community Plan at 15-6; CP 244). Second, the District will have increased tax revenues to fund necessary expansion.

> Increased population, particularly in the Birch Point area will necessitate manning the fire station at Semiahmoo on a 24-hour basis. Additional equipment will also need to be brought to the station to maximize its effectiveness. *These costs will be borne by taxes paid by the growing population.* The Birch Bay station now being utilized as a manned fire station must undergo substantial remodeling in the future to house firefighters and EMTs.

(Birch Bay Community Plan at 15-6; CP 244) (emphasis added).

Under RCW 36.70B.030, these standards represent "fundamental land use planning choices" that "serve as the foundation for project review." The Legislature made the intent of this provision clear.

> Given the extensive investment that public agencies and a broad spectrum of the public are making and

> will continue to make in comprehensive plans and development regulations for their communities, it is essential that project review start from the fundamental land use planning choices made in these plans and regulations. If the applicable regulations or plans identify the type of land use, specify residential density in urban growth areas, and identify and provide for funding of public facilities needed to serve the proposed development and site, these decisions at a minimum provide the foundation for further project review unless there is a question of code interpretation. The project review process, including the environmental review process under chapter 43.21C RCW and the consideration of consistency, should start from this point and *should not reanalyze these land use planning decisions in making a permit decision.*

1995 Laws of Washington ch. 347 §§ 404-05 (emphasis added).

B. The Plan's Funding Standard Was Binding

Until amending the Plan in November 2009, Whatcom County determined that tax revenues would ensure the District had adequate capacity to serve the urban growth area. This was a planning decision and did not foreclose the District from using other lawful funding sources. Under RCW 36.70B.030, this decision was binding during project review.

> (2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such

> applicable regulations or plans shall be determinative of the:
>
> (a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;
>
> (b) Density of residential development in urban growth areas; and
>
> (c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by chapter 36.70A RCW.

RCW 36.70B.030.

The Community Plan, in conjunction with Whatcom County's Comprehensive plan, satisfied this statute by providing "for funding of these facilities as required by chapter 36.70A RCW." RCW 36.70B.030(2)(c). First, the Community Plan provided a description of the existing facilities and services, standards, and proposed expansions and improvements for the District. (Community Plan at 15-2 – 15-6; CP 240-44).

Second, Chapter four of the Whatcom County Comprehensive Plan required the County to

> [w]ork with special districts, cities, and other major non-county facility providers including water and sewer districts, fire districts, public utility districts and others as appropriate to establish levels of service for

> urban growth areas. This must be done in order to assure facilities adequate to provide for anticipated population growth and development consistent with land use plan designations and zoning.

(Whatcom County Comprehensive Plan, Chapter 4 at 4-9). Furthermore, Goal 4-B of the Comprehensive Plan required the County to

> develop a six-year financing program for capital facilities that meets the requirements of the GMA, achieves the county's levels-of-service, and is within financial capability as determined by projected financial resources.

(Comprehensive Plan at 4-4).

Finally, the District was one of eleven stakeholders in the development of the Birch Bay Community Plan. (Birch Bay Community Plan at 3-10; CP 234). As the Community Plan details,

> the planning process was financed by a group of eleven Stakeholders. In addition to contributing their funds, the Stakeholders also contributed their expertise and in-kind services. For example, Whatcom County contributed map making and printing services, in addition to contributing their expert planning advice. The eleven Stakeholders are listed below:
>
> - Birch Bay Chamber of Commerce
> - Blaine School District
> - Brown and Cole Stores
> - BP – Cherry Point
> - Port of Bellingham
> - Trillium Corporation
> - Washington State Department of Ecology

- Whatcom County Planning & Development Services
- Whatcom County Fire District #7
- Whatcom County Fire District #13
- Williams Energy

(Birch Bay Community Plan at 3-10; CP 234).* The Community Plan appropriately provided for funding of fire protection services through increased tax revenues.

In the Court of Appeals, the District disparaged the Community Plan's funding standards, calling them "wishful statements". (Response Brief at 19) ("the Birch Bay Plan made wishful statements about the District's necessary expansion of facilities and staff being borne by taxes paid by a growing population"). The District criticizes a Plan it helped create. (Birch Bay Community Plan at 3-10; CP 234). Furthermore, the District failed to object to the Plan when the County Council evaluated and approved it. Finally, the District never challenged the Plan before the Western Washington Growth Hearings Board under RCW 36.70A.280.

An appeal to the Growth Hearings Board, not piecemeal disagreement during project review, is the only appropriate method

* Fire Districts 7 and 13 merged to become Fire District 21.

to challenge the Community Plan's statement. The trial court criticized the Community Plan, stating

> [t]he 2004 Birch Bay Community Plan itself makes only conclusory statements without any analysis and is not a capital facilities plan contemplated by RCW 36.70A.070(3). Nothing in the Birch Bay Community Plan addressed the potential changes in structure, such as a change in the Countywide EMS system, which occurred since the Birch Bay Community Plan was adopted and hearing on this matter.

(Final Decision ¶ 4(e); CP 6). If the Plan was inadequate, the District had an obligation to appeal it to the Growth Hearings Board. It could not attack it during project review. "A petitioner cannot use the LUPA process to raise issues that should have been brought before the GMHB." Somers v. Snohomish County, 105 Wn. App. 937, 944, 21 P.3d 1165 (2001).

Once the Community Plan set the concurrency standards, all parties must accept them during project review. Neither the County nor the District could change the concurrency standards when reviewing the four projects. For good reason, the Growth Management Act prohibits service providers from setting their own levels of service. The Growth Management Act makes clear that concurrency plans are part of the long-term planning for growth,

and counties should not amend the plans to satisfy a particular party during project review.

C. The County Appropriately Approved The Projects Despite The District's Assertions

Even if the District asserts it lacks capacity to maintain the level of service in the Birch Bay urban growth area, the County has the power to approve the projects. Under Whatcom County Code 20.82.212,

> [n]o subdivision, commercial development, or conditional uses shall be approved without a written finding that:
>
> (1) All providers of water, sewage disposal, school and fire protection serving the development have issued a letter that adequate capacity exists or arrangements have been made to provide adequate services for the development.
>
> (2) No county facilities shall be reduced below applicable level of service as a result of the development.
>
> (WCC 20.80.212).

First, the phrase "arrangements have been made to provide adequate services for development" allows the County to look beyond the District's claims. The Hearing Examiner did this by examining the alternative sources of funding available to the District. (Hearing Examiner's Decision at 6; CP 343). Furthermore,

Department of Commerce regulations recommend an interlocal agreement between the County and District to coordinate their planning and operations.

> Counties and cities should coordinate with and reach agreements with other affected purveyors or service providers when establishing level of service standards for facilities or services provided by others.

WAC 365-196-840.

Second, concurrency planning is different from concurrency review for a particular project. As discussed above, planning involves longer term predictions on the growth of areas and the ability of public facilities and services to respond. Sometimes planning does not predict with perfect accuracy. When this happens, the appropriate response, outside of transportation concurrency, is to increase capacity, not to deny otherwise valid projects.

> *Providing adequate public facilities is a component of the affirmative duty created by the act for counties and cities to accommodate the growth that is selected and allocated*, to provide sufficient capacity of land suitable for development, and to permit urban densities.

WAC 365-196-415(3)(a)(Appendix C).

Concurrency review identifies whether the planning assumptions are accurate or not. It does not create an opening to

revise the fundamental planning choices. Instead, it should prompt coordination between the County and the District to address the predicted impacts of development. WAC 365-196-840(6). Here, the County appropriately approved the four projects despite the District's concerns. The end result has been significant changes to the Birch Bay Community Plan and Whatcom County's Comprehensive Plan.

CONCLUSION

Whatcom County has final authority to decide whether concurrency exists in an urban growth area. To make this decision, the County must apply and follow the "fundamental land use choices" made in its comprehensive plan and development regulations. Because Fire District 21 acted outside its authority by changing the level of fire protection services established in the County's comprehensive plan, and then claiming a lack of concurrency, Respondents Birch Point Village et al., respectfully request this Court to affirm the Hearing Examiner and dismiss this appeal.

DATED this 29th day of March, 2010.

BURI FUNSTON MUMFORD, PLLC

By _____

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Supplemental Brief of Respondent Developers to:

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DATED this 29th day of March, 2010.

Heidi Main

APPENDIX A

Westlaw

WAC 365-196-840

Wash. Admin. Code 365-196-840

WASHINGTON ADMINISTRATIVE CODE
TITLE 365. COMMERCE, DEPARTMENT OF (COMMUNITY DEVELOPMENT) FORMERLY CTED (COMMUNITY DEVELOPMENT)
CHAPTER 365-196. GROWTH MANAGEMENT ACT-PROCEDURAL CRITERIA FOR ADOPTING COMPREHENSIVE PLANS AND DEVELOPMENT REGULATIONS
PART EIGHT DEVELOPMENT REGULATIONS

Current with amendments adopted through February 3, 2010.

5-196-840. Concurrency.

(1) Purpose.

(a) The purpose of concurrency is to assure that those public facilities and services necessary to support development are adequate to serve that development at the time it is available for occupancy and use, without decreasing service levels below locally established minimum standards.

(b) Concurrency describes the situation in which adequate facilities are available when the impacts of development occur, or within a specified time thereafter. Concurrency ensures consistency in land use approval and the development of adequate public facilities as plans are implemented, and it prevents development that is inconsistent with the public facilities necessary to support the development.

(c) With respect to facilities other than transportation facilities counties and cities may fashion their own regulatory responses and are not limited to imposing moratoria on development during periods when concurrency is not maintained.

(2) Determining the public facilities subject to concurrency. Concurrency is required for locally owned transportation facilities and for transportation facilities of statewide significance that serve counties consisting of islands whose only connection to the mainland are state highways or ferry routes. Counties and cities may adopt a concurrency mechanism for other facilities that are deemed necessary for development. See WAC 365-196-415(5).

(3) Establishing an appropriate level of service.

(a) The concept of concurrency is based on the maintenance of specified levels of service with respect to each of the public facilities to which concurrency applies. For all such facilities, counties and cities should designate appropriate levels of service.

(b) Level of service is typically set in the capital facilities element or the transportation element of the comprehensive plan. The level of service is used as a basis for developing the transportation and capital facilities plans.

(c) Counties and cities should set level of service to reflect realistic expectations consistent with the achievement of growth aims. Setting levels of service too high could, under some regulatory strategies, result in no growth. As a deliberate policy, this would be contrary to the act.

(d) Counties and cities should coordinate with and reach agreements with other affected purveyors or service providers when establishing level of service standards for facilities or services provided by others.

(e) The level of service standards adopted by the county or city should vary based on the urban or rural character of the surrounding area and should be consistent with the land use plan and policies. The county or city should also balance the desired community character, funding capacity, and traveler expectations when adopting levels of service for transportation facilities. For example a plan that calls for a safe pedestrian environment that promotes walking or one that promotes development of a bike system so that biking trips can be substituted for auto trips may suggest using a level of service that includes measures of the pedestrian environment.

(f) For transportation facilities, level of service standards for locally owned arterials and transit routes should be regionally coordinated. In some cases, this may mean less emphasis on peak-hour automobile capacity, for example, and more emphasis on other transportation priorities. Levels of service for highways of statewide significance are set by the Washington state department of transportation. For other state highways, levels of service are set in the regional transportation plan developed under RCW 47.80.030. Local levels of service for state highways should conform to the state and regionally adopted standards found in the statewide multimodal transportation plan and regional transportation plans. Other transportation facilities, however, may reflect local priorities.

(4) Measurement methodologies.

(a) Depending on how a county or city balances these factors and the characteristics of travel in their community, a county or city may select different ways to measure travel performance. For example, counties and cities may measure performance at different times of day, week, or month (peak versus off-peak, weekday versus weekend, summer versus winter). A city or county may choose to focus on the total multimodal supply of infrastructure available for use during a peak or off-peak period. Counties and cities may also measure performance at different geographic scales (intersections, road or route segments, travel corridors, or travel zones or measure multimodal mobility within a district).

(b) In urban areas, the department recommends counties and cities adopt methodologies that analyze the transportation system from a comprehensive, multimodal perspective, as authorized by RCW 36.70A.108. Multimodal level of service methodologies and standards should consider the needs of travelers using the four major modes of travel (auto, public transportation, bicycle, and pedestrian), their impacts on each other as they share the street or intersection, and their mode specific requirements for street and intersection design and operation.

(c) Although level of service standards and measurement methodologies are interrelated, changes in methodology, even if they have an incidental effect on the resulting level of service for a particular facility, are not necessarily a change in the level of service standard.

(5) Concurrency regulations.

(a) Each planning jurisdiction should produce a regulation or series of regulations which govern the operation of that jurisdiction's concurrency management system. This regulatory scheme will set forth the procedures and processes to be used to determine whether relevant public facilities have adequate capacity to accommodate a proposed development. In addition, the scheme should identify the responses to be taken when it is determined that capacity is not adequate to accommodate a proposal. Relevant public facilities for these purposes are those to which concurrency applies under the comprehensive plan. Adequate capacity refers to the maintenance of concurrency.

(b) Compliance with applicable environmental requirements, such as ambient air quality standards or water quality standards, should have been built into the determination of the facility capacities needed to accommodate anticipated growth.

(c) The variations possible in designing a concurrency management system are many. However, such a system could include the following features:

(i) Capacity monitoring - a process for collecting and maintaining real world data on use for comparison with evolving public facility capacities in order to show at any moment how much of the capacity of public facilities is being used;

(ii) Capacity allocation procedures - a process for determining whether proposed new development can be accommodated within the existing or programmed capacity of public facilities. This can include preassigning amounts of capacity to specific zones, corridors or areas on the basis of planned growth. For any individual development this may involve:

(A) A determination of anticipated total capacity at the time the impacts of development occur.

(B) Calculation of how much of the total capacity will be used by existing developments and other planned developments at the time the impacts of development occur. If a local government does not require a concurrency certification or exempts small projects from the normal concurrency process, it should still calculate the capacity used and subtract that from the capacity available.

(C) Calculation of the amount of capacity available for the proposed development.

(D) Calculation of the impact on capacity of the proposed development, minus the effects of any mitigation provided by the applicant. (Standardized smaller developments can be analyzed based on predetermined capacity impact values.)

(E) Comparison of available capacity with project impact. For any project that places demands on public facilities, cities and counties must determine if levels of service will fall below locally established minimum standards.

(iii) Provisions for reserving capacity - a process of prioritizing the allocation of capacity to proposed developments. This process might include one of the following alternatives:

(A) Setting aside a block or blocks of available or anticipated capacity for specified types of development fulfilling an identified public interest;

(B) Adopting a first-come, first-served system of allocation, dedicating capacity to applications in the or-

der received; or

(C) Adopting a preference system giving certain categories or specified types of development preference over others in the allocation of available capacity.

(6) Regulatory response to the absence of concurrency. The comprehensive plan should provide a strategy for responding when approval of any particular development would cause levels of service for concurrency to fall below the locally adopted standards. To the extent that any jurisdiction uses denial of development as its regulatory response to the absence of concurrency, consideration should be given to defining this as an emergency for the purposes of the ability to amend or revise the comprehensive plan.

(a) In the case of transportation, an ordinance must prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan unless improvements or strategies to accommodate the impacts of development are made concurrent with the development.

(i) These strategies may include increased public transportation service, ride sharing programs, demand management, and other transportation systems management strategies.

(ii) 'Concurrent with development' means that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

(b) If the proposed development is consistent with the land use element, relevant levels of service should be reevaluated.

(c) Other responses could include:

(i) Development of a system of deferrals, approving proposed developments in advance but deferring authority to construct until adequate public facilities become available at the location in question. Such a system should conform to and help to implement the growth phasing schedule contemplated in the land use and capital facilities elements of the plan.

(ii) Conditional approval through which the developer agrees to mitigate the impacts.

(iii) Denial of the development, subject to resubmission when adequate public facilities are made available.

(iv) Redesign of the project or implementation of demand management strategies to reduce trip generation to a level that is within the available capacity of the system.

(v) Transportation system management measures to increase the capacity of the transportation system.

(7) Form, timing and duration of concurrency approvals. The system should include provisions for how to show that a project has met the concurrency requirement, whether as part of another approval document (e.g., permit, platting decisions, planned unit development) or as a separate certificate of concurrency, possibly a transferable document. This choice, of necessity, involves determining when in the approval process the concurrency issue is evaluated and decided. Approvals, however made, should specify the length of time that a concurrency determination will remain effective, including requirements for development progress necessary to maintain approval.

(8) Provisions for interjurisdictional coordination - SEPA consistency. Counties and cities should consider integ- rating SEPA compliance on the project-specific level with the case-by-case process for concurrency manage- ment.

Statutory Authority: RCW 36.70A.050 and 36.70A.190. 10-03-085, S 365-196-840, filed 1/19/10, effective 2/19/10.

<General Materials (GM) - References, Annotations, or Tables>

WAC 365-196-840, WA ADC 365-196-840
WA ADC 365-196-840

END OF DOCUMENT

APPENDIX B

WHATCOM COUNTY HEARING EXAMINER

RE: SEPA Appeal Application for	)	APL06-0069
Fire District No. 13	)	Findings of Fact,
Birch Point Village, L.L.C.	)	Conclusions of Law,
"Horizons Village at Semiahmoo"	)	and Decision

SUMMARY OF APPEAL AND DECISION

Appeal: Whatcom County Fire District No. 13 and Birch Point Village, L.L.C. have appealed the Mitigated Determination of Non-significance, issued by the Whatcom County Responsible Official for SEPA, on May 3, 2006.

Summary of Decision: The Hearing Examiner concludes that mitigating conditions #1 and #2 regarding Fire District No. 13's request for financial contributions or fees from the developer should not have been included as mitigating conditions on the Determination of Non-significance and that SEPA cannot be used to require a project proponent to contribute money to Fire District No. 13 to mitigate impacts from a proposed development.

Findings of Fact

I.

Preliminary Information

Appellants: Birch Point Village, L.L.C.
Fire District No. 13

Hearing Dates: May 3, May 10, June 9, 2006
Written record remained open until June 15, 2006, for comments re: Fire District 13 Letter dated June 8, 2006, Exhibit #24, submitted at the hearing.

Parties of Record:

Fred Bovenkamp
Birch Point Village LLC
3975 Irongate Road
Bellingham, WA 98225

Craig Parkinson
David Evans and Associates, Inc

119 Grande Avenue, Suite D
Bellingham, WA 98225

Douglas Robertson
900 Dupont Street
Bellingham, WA 98225

Jon Sitkin
1500 Railroad Avenue
Bellingham, WA 98225

Royce Buckingham
Whatcom County Civil Deputy Prosecutor

Chief Tom Fields
Whatcom County Fire District No. 13
307 –19th Street
Lynden, WA 98264

Meg Grable and Ralph Falk
Birch Bay Village Community Club
8055 Cowichan Road
Blaine, WA 98230

Kathy Berg
7585 Sterling Avenue
Birch Bay, WA 98230

Trevor Hoskins
8686 Great Horned Owl
Blaine, WA 98230

Leanne Smith
8396 Grouse Crescent
Blaine, WA 98230

James Kawa
8395 Richmond Park Road
Blaine, WA 98230

Tom Vuyovich
8422 Shintaffer
Blaine, WA 98230

Roger McCarthy
Division of Engineering

Martin Blackman
SEPA Responsible Official

Marilyn Bentley
Planning and Development Services

Copy of Decision to
Aubrey Cohen, Bellingham Herald

Jack Kintner, Point Roberts Press, Inc.

Exhibits

1 Appeal Application, with attached letter of support dated April 13, 2006, from Jon Sitkin

2 Letter dated April 20, 2006, from Jon Sitkin

3 Staff Report, dated May 3, 2006

4 Memo from Martin Blackman, dated May 2, 2006

5 Concurrency and Infrastructure Update, dated April 19-20, 2006

6 Letter dated August 19, 2005 from Fire District #13 to David Evans and Associates

7 SEPA Appeal Brief, dated May 3, 2006 from Jon Sitkin, with attachment 7(a) – County color-coded map 'pending projects/zoning'

8 Brief, dated May 2, 2006 from Douglas Robertson, with attachments
- 8(1) Table showing Taxing District/Fire District #13
- 8(2) County Treasurers Monthly Report-Dec 2005 Fire Distr 13
- 8(3) Map-Commercial/Residential Projects-Pending
- 8(4) Fire Distr 13 Resolution No. 2005-017
- 8(5) Concurrency Mitigation Agreement – County/Fire Distr 13
- 8(6) Letter dated March 5, 2006 re: Sunrise Meadows Residential Development, from David Evans & Associates
- 8(7) Series of Memoranda, beginning date March 29, 2006, from Doug Robertson, re: Sunrise Meadow

9 MDNS, dated May 3, 2006; Exhibit 9A Mr. Robertson's letter, dated May 4, 2006

10 Letter dated May 4, 2006, from Jonathan Sitkin re: excluding Condition #4 from Sitkin letter dated September 15, 2005 related to police services (Staff Report Condition #11).

11 Brief dated May 9, 2006 from Doug Robertson, with supporting material in binder

12 Letter (fax) dated May 8, 2006 from Jon Sitkin

13 Letter dated May 8, 2006 from Jon Sitkin

14 Rezone Brief – Objections to Site Specific from Jon Sitkin

15 County's Memorandum re: SEPA Final Decision, dated May 8, 2006

16 SEPA Issues – Brief from Jon Sitkin

17 Fire District No. 13 letter, dated May 10, 2006

18 Memorandum, dated May 10, 2006, from Troy Holbrook

19 Memorandum dated May 10, 2006 from Bob Martin

20 Amended SEPA Appeal, dated May 22, 2006 from Birch Point Village, LLC

21 SEPA Appeal, dated May 30, 2006 from Whatcom County Fire District No. 13

22 Supplemental Brief in Support of Appeal, SEP06-0069, dated June 8, 2006, with attachments, from Doug Robertson

23 Whatcom County Fire District No. 13 ("DISTRICT") Supplemental Brief on Whatcom County Concurrency Requirements, dated June 7, 2006, with attachments, from Jon Sitkin

24 Fire District No. 13 Letter, dated June 8, 2006

25 Jon Sitkin's Legal Citations Notebook

26 Letter dated June 22, 2006, from Douglas Robertson

27 Hearing Examiner's Entire File for Birch Point Village, L.L.C. applications for Site Specific Rezone, ZON05-0019, Planned Unit Development, PUD05-0005, and Binding Site Plan, BSP05-0004

II.

Birch Point Village, L.L.C. is seeking approval for a Site Specific Rezone, Planned Unit Development, and General Binding Site Plan for a proposed mixed-use development of up to 200 residential units (multi-family) and up to 134,000-square feet of commercial space on a 36.23-acre site located within the Birch Bay Urban Growth Area and designated with a Long Term Planning Area Designation.

On August 19, 2005, Whatcom County Fire Protection District No. 13 responded to this proposed development with a letter indicating that the District will serve the property site for the Horizons Village development proposal.

A Mitigated Determination of Non-significance under the State Environmental Policy Act was issued by the Whatcom County Responsible Official on March 16, 2006. This SEPA Determination was appealed by Fire District No. 13 in a Notice of Appeal, dated April 13, 2006. The Fire District stated that the grounds for the appeal were that the SEPA Determination did not adequately address the impacts of the project on the District's ability to provide emergency medical response, fire response, and transport. Filed with the appeal is a letter from the District's attorney, dated April 13, 2006, containing mitigating conditions the District felt should be added to the SEPA Determination, including a Mitigation Fee of $384.00 per vehicle average daily trip to be paid directly to the District prior to the District's issuance of a letter of concurrency or, in the alternative, a Concurrency Fee Agreement reached with the District, based on a $2,500 per residential living unit and additional equivalency fees for the commercial parts of the development.

Pursuant to County ordinance and State law, the SEPA Appeal was scheduled for hearing at the same time as the hearing on the merits of the Horizons Village at Semiahmoo Project.

III.

The hearing was opened on both the project and on Fire District No. 13's SEPA Appeal, on May 3, 2006. Also on May 3, 2006, the SEPA Official withdrew the MDNS issued on March 16, 2006, and issued a new MDNS which included, as Conditions #1 and #2, requirements that the developer contribute to a planning study regarding the Fire District's ability to provide services for new growth and a "concurrency assessment contribution" to be made by the applicant to the District based on the results of the "concurrency planning study." MDNS Condition #2 required that, if the planning was not done prior to actual development, the applicant and Fire District No. 13 enter into a "mediated agreement ..... based on the best current available estimates of the impacts of increased population created by the proposed development ..." to determine the project's contribution (fees) to the Fire District to mitigate impacts from the development on the Fire District.

The new SEPA Determination required a fourteen day comment period as well as a period in which to file appeals. For this reason, the hearing on the project was continued.

Both the applicant and Fire District No. 13 appealed the May 3, 2006 SEPA Determination and these appeals were heard at an open record hearing on the project proposal on June 9, 2006.

IV.

The applicant has taken the position that the fees or "contributions" requested by Fire District No. 13 cannot be required. The Fire District takes the position that the SEPA analysis was inadequate and that the Responsible Official should have required an Environmental Impact Statement regarding the impacts of this development on the Fire District's ability to provide appropriate services in the future. Previous development proposals faced with similar requests, combined with Fire District No. 13's unwillingness to provide a concurrency letter, have lead to prior "voluntary agreements" to pay "concurrency mitigation" fees to the Fire District.

In this case, the project proponents indicate that the requested fees would be in excess of one million dollars and have declined to enter into such an agreement with the Fire District. Because there was no "voluntary agreement" to pay fees, the Fire District indicates that it will not provide a Concurrency Letter stating that the District will be able to adequately serve this development and therefore the development cannot proceed. The project proponent argues that the County Council has decided the issue of concurrency in regard to fire protection in the Birch Bay Urban Growth Area through adoption of the Birch Bay Community Plan and that the County or Fire District cannot legally impose impact fees on new development within the County's Urban Growth Area to mitigate growth impacts on Fire District No. 13.

V.

Fire District No. 13 has not completed a Capital Facilities Planning Process. Fire District No. 13 believes that completion of such a Capital Facilities Plan would "... result in an Interlocal Agreement between the County and the District to ensure that prior to development occurring in the Birch Bay Area, the appropriate mitigation fee related to urban levels of service would be paid."

The District states that it will not be able to provide the current level of service to future development without such a concurrency mitigation or impact fee. However, since the Fire District has not completed its planning process, the District's position can be best characterized only as speculation. The District has a number of State authorized funding mechanisms, including levies and the issuance of capital facilities bonds. Central to the District's arguments about its potential inability to provide an adequate level of service to meet the demands of new growth without "concurrency mitigation fees," the District cites the increased burden on the District's ability to provide Emergency Medical Services to a

growing population and cites the financial impact that these increased EMS services will have on the District's ability to provide fire protection to the district. At no point does the District discuss the fact that Whatcom County voters increased the sales tax to provide a separate funding mechanism for Emergency Medical Services county-wide. This funding source is in addition to the other specific authorized funding mechanisms that the State has provided to fire districts.

Based on the record before the Hearing Examiner, the Hearing Examiner finds, on a more likely than not basis, that the Fire District will be able to continue to provide an adequate level of fire protection and emergency response services to the district, even with significant new growth, based on the currently authorized funding mechanisms available to the Fire District and the increased taxes and fees paid by the new growth.

Fire District No. 13, as an "interim measure," has passed resolutions calling for a $2,500 per living unit, "concurrency mitigation fee," for new development within the district. Since this proposed development is a mixed-use development, the District also feels that it should obtain such a fee for the retail and commercial development proposed.

VI.

Whatcom County was and is required to do concurrency planning under the Growth Management Act. Concurrency planning is aimed at ensuring that necessary public services are available to serve new developments as they come on line. The Whatcom County Council has addressed fire services in the Birch Bay Community Plan Component of the Whatcom County Comprehensive Plan. On pages 15-5 and 15-6, the Birch Bay Comprehensive Plan describes the existing facilities and services of Fire District No. 13, addresses the standards for response time, indicates proposed or needed expansions and improvements, and states that the cost of the necessary expansions and improvements to meet further growth, "...will be born by taxes paid by the growing population."

The only time concurrency is addressed in the Whatcom County Zoning Ordinance is in WCC 20.80.212, which reads as follows:

> **20.80.212 Concurrency.**
> **No subdivision, commercial development, or conditional uses shall be approved without a written finding that:**
>
> **(1) All providers of water, sewage disposal, school, and fire protection serving the development have issued a letter that adequate capacity exists or arrangements have been made to provide adequate services for the development.**
>
> **(2) No county facilities shall be reduced below applicable level of service as a result of the development.**

Fire District No. 13 has refused to provide a Concurrency Letter under WCC 20.80.212 until such time the project proponent enters into a "voluntary agreement" to provide fees as described above to the Fire District. Fire District No. 13 argues that their requested "concurrency mitigation fee," requiring the developer to pay the fire district fees for the purported impacts of the development on the fire district should be either the subject of an Environmental Impact Statement to determine the impacts from the proposed development and the need for such a fee, or should be imposed by mitigating conditions attached to the SEPA Determination of Non-significance.

The project proponent argues that the Fire District's request for fees is contrary to law, that their proposed development is entitled to proceed without payment of any such fees to the Fire District, and that the Responsible Official for SEPA should not have included any requirements regarding payments or contributions to Fire District No. 13 as part of the MDNS issued.

VII.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

Conclusions of Law

I.

The issues raised by these appeals deal with meshing of the State Environmental Policy Act, the Growth Management Act, the Washington Administrative Code Provisions regarding both SEPA and GMA, the Whatcom County Comprehensive Plan, and Whatcom County Zoning Ordinance. Also involved in the analysis are sections of the Revised Code of Washington relating to fire districts, RCW 58.17 regarding subdivisions, and RCW 82.02, which allows impact fees on development.

WCC 16.08.170 allows appeals of a Final Determination of Non-significance.

This section also states that the SEPA Determination under the Responsible Official "...shall carry substantial weight in any appeal proceeding."

The Hearing Examiner is given the right to reverse a threshold determination "...when, although there is evidence to support it, the Hearing Examiner, on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

WAC 197-11-680 allows Administrative Appeals on SEPA procedures only "...to review a Final Threshold Determination and Final EIS." The project proponents suggest that the Responsible Official's withdrawal of the original SEPA Determination (MDNS) was in error, that the Hearing Examiner should rule that the revised or second MDNS determination does not have any legal weight, and that the original determination applies.

The Washington Administrative Code gives the Responsible Official the power to withdraw a SEPA Determination and re-issue it. A decision to withdraw a SEPA Determination made by the Responsible Official is not a Final Threshold Determination and therefore it cannot be appealed to the Hearing Examiner. The Final Threshold Determination in this case was the second Mitigated Determination of Non-significance issued by the Responsible Official on May 3, 2006.

The SEPA issue before the Hearing Examiner is to decide if, as argued by Fire District No. 13, an Environmental Impact Statement should have been required to determine the impacts of this proposal on the Fire District's ability to provide adequate services in the future, or, as argued by the project proponent, that the SEPA Official erroneously included conditions #1 and #2 related to requiring the project proponent to contribute toward the cost of preparing a Capital Facilities Plan and, based on this plan, to contribute monies to mitigate impacts on the ability of the Fire District to provide adequate services as a result of on-going development within the district.

II.

The State Environmental Policy Act preceded the Growth Management Act by a number of years. The adoption of the Growth Management Act and associated statutes and WACs have revised the way SEPA is applied to land use issues, including subdivision and new residential and non-residential development. Fire District No. 13 is attempting to impose fees upon development to mitigate impacts of development on the Fire District's ability to provide adequate services, based on SEPA. Fire District No. 13 argues that these are not impact fees, but are instead "concurrency mitigation fees" required to ensure that the concurrency requirements of the Growth Management Act are met; and, that an Environmental Impact Statement is required, because, without such fees, on-going growth will lead to significant adverse impacts because the District will not have the funds to provide adequate services. Adoption of Fire District No. 13's position would require fire services concurrency planning and the imposition of impact fees through the process of an Environmental Impact Statement for each project proposed within the District's boundaries. The Growth Management Act requires Whatcom County to do the concurrency planning as part of its Comprehensive Plan and development regulation responsibilities pursuant to the Growth Management Act. Whatcom County addressed fire protection concurrency when it adopted the Birch Bay Comprehensive Plan and concluded that the funding needs of Fire District No. 13 could adequately be met by taxes generated by the new growth.

If Fire District No. 13 felt that Whatcom County's concurrency planning for fire services within the district was inadequate, the Fire District needed to raise these issues during the planning process and, if an acceptable result was not reached, the Fire District needed to appeal the concurrency planning undertaken by Whatcom County to the Growth Management Hearings Board. Based on State law, concurrency issues cannot be raised outside of the Growth Management Act planning process and cannot be addressed on a project by project basis through the application of the State Environmental Policy Act.

Fire District No. 13's argument that concurrency should be addressed in an Environmental Impact Statement on a project by project basis fails to recognize that the comprehensive planning done by Whatcom County pursuant to the Growth Management Act has already undergone an environmental analysis pursuant to SEPA and that State law under the Growth Management Act requires county-wide concurrency planning.

III.

State law, in fact, prohibits review of the availability and adequacy of fire protection service during project review on a specific project. RCW 36.70B.030 reads as follows:

(1) **Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project's consistency with applicable development regulations, or in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.**

(2) **During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:** [emphasis added]

(a) **Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;**

(b) **Density of residential development in urban growth areas; and**

(c) **Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by chapter 36.70A RCW.** [emphasis added]

(3) **During project review, the local government or any subsequent reviewing body shall not reexamine alternatives to or hear appeals on the items identified in subsection (2) of this section, except for issues of code interpretation. As part of its project review process, a local government shall provide a procedure for obtaining a code interpretation as provided in RCW 36.70B.110.** [emphasis added]

(4) **Pursuant to RCW 43.21C.240, a local government may determine that the requirements for environmental analysis and mitigation measures in**

development regulations and other applicable laws provide adequate mitigation for some or all of the project's specific adverse environmental impacts to which the requirements apply.

(5) Nothing in this section limits the authority of a permitting agency to approve, condition, or deny a project as provided in its development regulations adopted under chapter 36.70A RCW and in its policies adopted under RCW 43.21C.060. Project review shall be used to identify specific project design and conditions relating to the character of development, such as the details of site plans, curb cuts, drainage swales, transportation demand management, the payment of impact fees, or other measures to mitigate a proposal's probable adverse environmental impacts, if applicable.

(6) Subsections (1) through (4) of this section apply only to local governments planning under RCW 36.70A.040.

As indicated in paragraph 2 above, the County's Comprehensive Plan and development regulations "... shall be determinative of the (c) availability and adequacy of public facilities identified in the Comprehensive Plan, if the plan or development regulations provide for funding of these facilities ....."

The Birch Bay Comprehensive Plan indicates that adequate fire service facilities will be funded by fire district's taxing authority. This Comprehensive Plan statement is determinative of the availability and adequacy of funding for fire protection services inside the boundaries of Fire District No. 13.

Even if these public facilities are not available, adequate, or are inadequately funded, paragraph 3 of RCW 36.70B.030 indicates that a reviewing body for a specific project "...shall not re-examine alternatives or hear appeals on the items identified in subsection (2) of this section, except for issues of code interpretation." This means that in reviewing this pending proposal, Whatcom County is not allowed to re-examine or hear appeals regarding the availability and adequacy of public facilities when those facilities are addressed in the Comprehensive Plan and when the plan indicates a funding mechanism for those facilities.

If Fire District No. 13 believes that the current Comprehensive Plan is inadequate to meet its funding needs in order to allow it to provide adequate services for future growth, the Fire District can docket the issue on the County's yearly Growth Management Act review calendar and have the issue re-visited. The issue cannot be re-visited at the specific project approval phase, as the Fire District is attempting to do here. Until, and unless, the Comprehensive Plan for Birch Bay is amended to remove the statement that the fire district will be able to provide adequate services based on its current taxing abilities, Fire District No. 13 cannot assert a lack of ability to do so on a project by project basis.

IV.

WCC 20.80.212 requires concurrency letters prior to approval of any project, and reads as follows:

> **20.80.212 Concurrency.**
> **No subdivision, commercial development, or conditional uses shall be approved without a written finding that:**
>
> **(1) All providers of water, sewage disposal, school, and fire protection serving the development have issued a letter that adequate capacity exists or arrangements have been made to provide adequate services for the development.**
>
> **(2) No county facilities shall be reduced below applicable level of service as a result of the development.**

The Fire District is contending that individual projects cannot be approved unless the Fire District has issued a letter pursuant to paragraph #1 above, which states, "...that adequate capacity exists or arrangements have been made to provide adequate services for the development." However, in the case of growth within the Birch Bay Urban Growth Area and within Fire District No. 13's boundaries, the Whatcom County Council has already determined that adequate capacity exists for current development and that adequate funding arrangements have been made to service future development within the Urban Growth Area. The Fire District cannot unreasonably refuse to issue a concurrency letter. In this case, since the Whatcom County Council has the authority to determine concurrency under the Growth Management Act and since the Whatcom County Council has determined within the Birch Bay Comprehensive Plan that Fire District No. 13 has adequate current capacity and that arrangements for adequate funding are in place to provide for future growth, Fire District No. 13 cannot stop this development by refusing to issue a concurrency letter.

V.

Neither Whatcom County nor Fire District No. 13 have the legal authority to require fees from developers for new development to off-set the impacts of increased growth on fire districts. In fact, imposition of such fees to benefit fire districts is specifically prohibited.

RCW 82.02 strictly limits the ability of municipal corporations to impose fees on new development by Preemption of certain taxing and fee imposition rights pursuant to RCW 82.02.020, which reads in relevant part as follows:

> **"Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall**

> impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land." [emphasis added]

RCW 8.02.050 specifically gives counties, cities, and towns that are required or choose to plan under the Growth Management Act the authority to impose impact fees on development activity to benefit public facilities as defined in RCW 82.02.090, subject to limitations. The definition of public facilities in RCW 82.02.090(7) limits the right to impose impact fees for fire protection to **"... (d) fire protection facilities in jurisdictions that are not part of a fire district."** [emphasis added]

Only jurisdictions required to plan under the Growth Management Act are entitled to impose impact fees. Impact fees cannot be imposed for fire protection facilities in jurisdictions that are part of a fire district. Pursuant to RCW 82.02 impact fees may not be imposed by any municipal corporation to off-set development costs for fire protection within a fire district.

Even if impact fees to benefit fire districts were allowed pursuant to RCW 82.02, impact fees can only be established through ordinance and may be collected and spent only for public facilities defined in RCW 82.02.090 [As indicated above, fire districts are specifically excluded as a public facility in this definition.], which have been addressed by a Capital Facilities Element of a Comprehensive Plan adopted pursuant to the Growth Management Act. RCW 82.02.050.

In addition, any local ordinance imposed to collect an impact fee must include addressing the availability of other means of funding public facility improvements. In the case of Fire District No. 13, the Whatcom County Council has already concluded that the funding mechanisms available to the Fire District will be adequate to allow it to provide a high level of service to future growth.

In an attempt to get around this specific prohibition on impact fees, the Fire District calls their fees "concurrency mitigation fees." However, the Fire District's proposed fee clearly meets the definition of impact fee in RCW 82.02.090 (3), which reads as follows:

> (3) **"Impact fee" means a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit**

the new development. "Impact fee" does not include a reasonable permit or application fee.

Even if the Fire District fee was not an "impact fee" as defined in RCW 82.02, the imposition of such a fee on new development is specifically prohibited by the State's Preemption Clause in RCW 82.02.020, as discussed above.

To require a developer to pay money to Fire District No. 13 to enable Fire District No. 13 to deal with costs associated with new development is illegal and such fees cannot be imposed by the County, the Fire District, or through SEPA analysis of individual projects.

The State of Washington provides for the funding of fire districts through the statutory granting of taxing and other funding mechanisms.

The State has recognized the need for emergency and fire protection services and for funding to provide new services necessitated by growth. RCW 52.26 addresses this issue, stating the legislature's finding in RCW 52.26.010, as follows:

The legislature finds that:

(1) The ability to respond to emergency situations by many of Washington state's fire protection jurisdictions has not kept up with the state's needs, particularly in urban regions;

(2) Providing a fire protection service system requires a shared partnership and responsibility among the federal, state, local, and regional governments and the private sector;

(3) There are efficiencies to be gained by regional fire protection service delivery while retaining local control; and

(4) Timely development of significant projects can best be achieved through enhanced funding options for regional fire protection service agencies, using already existing taxing authority to address fire protection emergency service needs and new authority to address critical fire protection projects and emergency services. [emphasis added]

The State does not allow imposition of impact fees on new development to assist fire districts in meeting financial needs resulting from growth. Instead, the State has recognized the need, and has addressed it by providing the statutory authority to allow these needs to be met through specific funding mechanisms authorized by the State.

VI.

Fire District No. 13 argues that their requested monetary payments for mitigation of development impacts is sought as a part of a voluntary agreement, which is allowed pursuant to RCW 82.02.020, and which reads in relevant part, as follows:

> **"This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment ..... to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat."**

As is clear in this situation, this developer has not been willing to enter into such a voluntary mitigation agreement with Fire District No. 13. The Fire District's attempt to obtain such an agreement by its refusal to provide the concurrency letter required by WCC 20.80.212 just serves to emphasize the lack of voluntary agreement. The requested payments cannot be justified by the District as a "concurrency mitigation fee" voluntarily agreed to by the developer.

VII.

In regard to this project, the Responsible Official under SEPA for Whatcom County has issued a Mitigated Determination of Non-significance. Two of the mitigating conditions deal with the mitigations of financial impacts to Fire District No. 13 from this proposed development.

A Threshold Determination of Non-significance may be issued as a Mitigated DNS pursuant to WAC 97-11-350. The purpose of a Mitigated Determination of Non-significance is to impose upon a project conditions which, if included as conditions of any approval, would result in a project which will not have a significant adverse impact on the environment. The Responsible Official for Whatcom County determined that there would be a probable significant adverse impacts on Fire District No. 13 if conditions were not included which would require the developer to contribute to capital facilities planning by the Fire District, and to enter into a "mediated agreement" for the payment of impact fees resulting from any increased service demands created by the development. Setting aside issues of the legality of any such impact fees, the Threshold Determination would have had to have been a result of a determination by the Responsible Official that there would be a significant adverse impact on fire protection services within the district if such planning was not done and such fees were not imposed upon this development. Such a conclusion is not supported by the record. The Hearing Examiner concludes, based on the record, that there is not a reasonable probability of significant adverse impacts even if mitigation conditions #1 and #2 are removed from the DNS. The record as a whole supports a conclusion at this time that the Fire District will be able to provide adequate services as a result of their current funding authorization from the State, which includes user fees, property taxes, and authority to issue bonds,

along with any new funding sources made available by the State legislature in the future, should the legislature determine additional funding sources are needed.

The Hearing Examiner concludes that Conditions #1 and #2 are not required to mitigate a probable significant adverse environmental impact and should not have been part of a Mitigated Determination of Non-significance. The Hearing Examiner should enter a decision on the SEPA Appeal which removes Conditions #1 and #2 from the list of Mitigated Conditions required by the Responsible Official.

VIII.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

DECISION

No mitigation fees can be obtained from this project proponent for possible impacts on fire protection services within Fire District No. 13 absent a voluntary agreement by the developer. Since there is no voluntary agreement, it is illegal to impose any kind of monetary payment or fees for fire protection on this development. For these reasons, the Responsible Official erred in including Conditions #1 and #2, related to mitigation of impacts on fire protection, as part of the Mitigated Determination of Non-significance on this proposal. Conditions #1 and #2 are deleted from the Mitigated Determination of Non-significance. The remaining MDNS conditions, which were not objected to, should be included by the Whatcom County Council as conditions of any approval on the underlying permits.

DATED this 29th day of June 2006.

Michael Bobbink

Michael Bobbink, Hearing Examiner

APPENDIX C

Westlaw

WAC 365-196-415

Wash. Admin. Code 365-196-415

WASHINGTON ADMINISTRATIVE CODE
TITLE 365. COMMERCE, DEPARTMENT OF (COMMUNITY DEVELOPMENT) FORMERLY CTED (COMMUNITY DEVELOPMENT)
CHAPTER 365-196. GROWTH MANAGEMENT ACT-PROCEDURAL CRITERIA FOR ADOPTING COMPREHENSIVE PLANS AND DEVELOPMENT REGULATIONS
PART FOUR FEATURES OF THE COMPREHENSIVE PLAN

Current with amendments adopted through February 3, 2010.

5-196-415. Capital facilities element.

(1) Requirements. The capital facilities element of a comprehensive plan must contain at least the following features:

(a) An inventory of existing capital facilities owned by public entities, also referred to as 'public facilities,' showing the locations and capacities of the capital facilities;

(b) A forecast of the future needs for such capital facilities based on the land use element;

(c) The proposed locations and capacities of expanded or new capital facilities;

(d) At least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and

(e) A requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

(2) Recommendations for meeting requirements.

(a) Inventory of existing facilities.

(i) Counties and cities should create an inventory of existing capital facilities showing locations and capacities, including the extent to which existing facilities have capacity available for future growth.

(ii) Capital facilities involved should include, at a minimum, water systems, sanitary sewer systems, storm water facilities, reclaimed water facilities, schools, parks and recreational facilities, police and fire protection facilities.

(iii) Capital facilities that are needed to support other comprehensive plan elements, such as transportation, the parks and recreation or the utilities elements, may be addressed in the capital facility element or in the

specific element.

(iv) Counties and cities should periodically review and update the inventory. At a minimum this review must occur as part of the seven-year periodic update required by RCW 36.70A.130(1). Counties and cities may also maintain this inventory annually in response to changes in the annual capital budget.

(b) Forecast of future needs.

(i) Counties and cities should forecast needs for capital facilities during the planning period, based on the levels of service or planning assumptions selected and consistent with the growth, densities and distribution of growth anticipated in the land use element. The forecast should include reasonable assumptions about the effect of any identified system management or demand management approaches to preserve capacity or avoid the need for new facilities.

(ii) The capital facilities element should identify all capital facilities that are planned to be provided within the planning period, including general location and capacity.

(A) Counties and cities should identify those improvements that are necessary to address existing deficiencies or to preserve the ability to maintain existing capacity.

(B) Counties and cities should identify those improvements that are necessary for development.

(C) Counties and cities may identify any other improvements desired to raise levels of services above locally adopted minimum standards, to enhance the quality of life in the community or meet other community needs not related to growth such as administrative offices, courts or jail facilities. Counties and cities are not required to set level of service standards for facilities that are not necessary for development. Because these facilities are not necessary for development, the failure to fund these facilities as planned would not require a reassessment of the land use element if funding falls short as required by RCW 36.70A.070 (3)(e).

(c) Financing plan.

(i) The capital facilities element should include creation of at least a six-year capital facilities plan for financing capital facilities needed within that time frame. Counties and cities should forecast projected funding capacities based on revenues available under existing laws and ordinances, followed by the identification of sources of public or private funds for which there is reasonable assurance of availability. Where the services and capital facilities are provided by other entities, these other providers should provide financial information as well. If the funding strategy relies on new or previously untapped sources of revenue, the capital facilities element should include an estimate of new funding that will be supplied. Adoption of the development regulations or other actions to secure these funding sources should be included in the implementation strategy.

(ii) The six-year plan should be updated at least biennially so financial planning remains sufficiently ahead of the present for concurrency to be evaluated. Such an update of the capital facilities element may be integrated with the county's or city's annual budget process for capital facilities.

(d) Reassessment.

(i) Counties and cities must reassess the land use element and other elements of the comprehensive plan if the probable funding falls short of meeting the need for facilities that are determined by a county or city to be necessary for development. Counties and cities should identify a mechanism to periodically evaluate the adequacy of public facilities based on adopted levels of service or other objective standards. The evaluation should determine if a combination of existing and funded facilities are adequate to maintain or exceed adopted level of service standards.

(ii) This evaluation must occur, at a minimum, as part of the periodic review and update required in RCW 36.70A.130(1), during the review of urban growth areas required by RCW 36.70A.130(3) and as major changes are made to the capital facilities element.

(iii) If public facilities are inadequate, local governments must address this inadequacy. If the reassessment identifies a lack of adequate public facilities, counties and cities may use a variety of strategies including, but not limited to, the following:

(A) Reducing demand through demand management strategies;

(B) Reducing levels of service standards;

(C) Increasing revenue;

(D) Reducing the cost of the needed facilities;

(E) Reallocating or redirecting planned population and employment growth within the jurisdiction or among jurisdictions within the urban growth area to make better use of existing facilities;

(F) Phasing growth or adopting other measures to adjust the timing of development, if public facilities or services are lacking in the short term for a portion of the planning period;

(G) Revising county-wide population forecasts within the allowable range, or revising the county-wide employment forecast.

(3) Relationship between the capital facilities element and the land use element.

(a) Providing adequate public facilities is a component of the affirmative duty created by the act for counties and cities to accommodate the growth that is selected and allocated, to provide sufficient capacity of land suitable for development, and to permit urban densities.

(b) The needs for capital facilities should be dictated by the land use element. The future land use map designates sufficient land use densities and intensities to accommodate the population and employment that is selected and allocated. The land uses and assumed densities identified in the land use element determine the location and timing of the need for new or expanded facilities.

(c) A capital facilities element includes the new and expanded facilities necessary for growth over the twenty-year life of the comprehensive plan. Facilities needed for new growth, combined with needs for maintenance and rehabilitation of the existing systems and the need to address existing deficiencies constitutes the capital facilities demand.

(4) Relationship to plans of other service providers or plans adopted by reference. A county or city should not meet their responsibility to prepare a capital facilities element by relying only on assurances of availability from other service providers. When system plans or master plans from other service providers are adopted by reference, counties and cities should do the following:

(a) Summarize this information within the capital facilities element;

(b) Synthesize the information from the various providers to show that the actions, taken together, provide adequate public facilities; and

(c) Conclude that the capital facilities element shows how the area will be provided with adequate public facilities.

(5) Relationship between growth and provision of adequate public facilities.

(a) Counties and cities should identify in the capital facility element which types of facilities it considers to be necessary for development.

(i) Counties and cities should identify facilities as necessary for development if the need for new facilities is reasonably related to the impacts of development.

(ii) Capital facilities must be identified as necessary for development if a county or city imposes an impact fee as a funding strategy for those facilities.

(iii) In urban areas, all facilities necessary to achieve urban densities must be identified as necessary for development.

(b) For those capital facilities deemed necessary for development, adequate public facilities may be maintained as follows:

(i) Transportation facilities are the only facilities required to have a concurrency mechanism, although a local government may adopt a concurrency mechanism for other facilities that are deemed necessary for development. See WAC 365-196-840.

(ii) Counties and cities should determine which capital facilities will be required as a condition of project approval, but not subject to concurrency. These may include, for example: Capital facilities required to ensure adequate water availability, capital facilities necessary to handle wastewater, and capital facilities necessary to manage storm water.

(iii) For capital facilities that are necessary for development, but not identified in subsection (2)(b)(ii)(A) or (B) of this section, counties and cities should set a minimum level of service standard, or provide some other objective basis for assessing the need for new facilities or capacity. This standard must be indicated as the baseline standard, below which the jurisdiction will not allow service to fall. Policies must require periodic analysis to determine if the adopted level of service is being met consistent with this section.

Statutory Authority: RCW 36.70A.050 and 36.70A.190. 10-03-085, S 365-196-415, filed 1/19/10, effective 2/19/10.

<General Materials (GM) - References, Annotations, or Tables>

WAC 365-196-415, WA ADC 365-196-415
WA ADC 365-196-415

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